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Case Digests

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PHYSICIANS AND SURGEONS: Liability for Unsuccessful Sterilization Operation.

Custodio v. Bauer, 59 Cal. Rptr. 463 (Ct. App. 1967).

Plaintiffs, husband and wife, brought suit to recover damages resulting from the wife becoming pregnant after defendants had performed an operation which was to render her sterile. At the time plaintiffs engaged defendants to perform the operation, they were the parents of nine children and the wife had an existing bladder and kidney condition which would be aggravated by an additional pregnancy. Defendants performed the operation and about one year later the wife discovered she was pregnant. At the hearing on appeal it was reported that both the mother and the child survived the delivery.

Plaintiffs presented a number of theories in their petition. Included were allegations of negligence, misrepresentation, and contract. The lower court entered a judgment of dismissal after sustaining without leave to amend defendant's demurer to the complaint.

On appeal, the main issues were whether there was any basis on which defendants could be held liable and whether the damages alleged were legally cognizable injuries. The court *held* that the lower court abused its discretion by sustaining defendant's demurrer without leave to amend and remanded the case for disposition in accordance with the opinion.

The court made no substantial deviations from the general rules of law in the area of recovery against physicians based on negligence, misrepresentation, and contract by their directions to the lower court. *See*, Annot., 27 A.L.R. 1250 (1923). However, even though the court cautioned that the determination of principles of public policy must await proof of damages in the case, the court's gratuitous statements on the issue of damages present some ideas which are of interest for future cases.

The court disposed of two unsuccessful vasectomy cases *Christensen v. Thornby*, 192 Minn. 123, 255 N.W. 620 (1934), and *Shaheen v. Knight*, 11 Pa. D. & C.2d 41 (1957), by saying that the former, which refused to allow any recovery for expenses of birth, and the latter, which refused to allow recovery for subsequent expenses of rearing and educating the child, were poorly reasoned. They said in reference to *Christensen* that it was a non sequitur to say that the expenses of birth are too remote to the sterilization and in reference to *Shaheen* that it begs the question to assume that the

compensation sought was the normal expense of the birth of a normal child. The court goes on to say that the preferable reasoning is that the members of the family have a "just share" in the family income that the court must somehow protect. This is to be handled by supplying the unwanted child with his own means of support as he joins the family and thus prevent emotional disruption of the previous family unit.

Since courts have been talking in terms of lack of proof of damages when asked for recovery based on the ordinary expense of rearing and educating a child, this decision presents a significant breakthrough in the law. Increased social concern with the size and financial position of the family could cause this position to gain support. When considered in light of the expanding field of products liability, this decision could hold substantial significance for the manufacturers of birth control pills.

FEDERAL ESTATE TAXES: Retained Interest under Section 2036

Estate of Binkley v. United States, 358 F.2d 639 (3d Cir. 1966).
Union Planters National Bank v. United States, 361 F.2d 662 (6th Cir. 1966).
Estate of Gutchess v. Commissioner, 46 T.C. 554 (1966).

These three cases all involve virtually the same problem: the estate tax treatment of an inter vivos transfer by a husband of the family home to his wife, the husband continuing to live in the house until his death. In all three cases the Commissioner has sought to place the value of the home in the husband's estate, contending that, by virtue of the husband's continued occupancy, it is a transfer with a retained life estate falling under INT. REV. CODE 1954, § 2036.

These cases are not the first in which the Commissioner has attempted to secure this tax result. He had earlier made attempts to place such property in a decedent's estate relying, as he has recently, on *Commissioner v. Estate of Church*, 335 U.S. 632 (1949). However, his prior efforts apparently met with little success and in 1952, he acquiesced in *Estate of Wier v. Commissioner*, 17 T.C. 409 (1951), *acquiesced in*, 1952-1 CUM. BULL. 4, wherein the court held *inter alia* that a family home so transfered could not be included in the husband's estate.

While the courts continued to rule that, absent a specific agreement for the husband's post transfer occupancy of the house, an inter vivos transfer to his wife effectively removed it from his estate, *see, e.g. Stephenson v. United States*, 238 F. Supp. 660 (W.D. Va.

1965). The Commissioner in 1966 apparently began a new concentrated attack on these transfers. He changed his acquiesence in *Wier* to non-acquiescence, 1966-1 CUM. BULL. 4, and renewed his attempts to include houses transfered to wives in the estates of husbands who continued to occupy them. The three instant cases, *Binkley, Union Planter's National Bank* and *Gutchess* followed in rapid succession. The courts refusing to deviate from their former position uniformly ruled that a husband transfering the family house to his wife has no right to remain there and that in the absence of an express agreement that he should continue to live there, no implied agreement to that effect will be found. The transfer thus construed is not within the terms of section 2036.

While the courts' rulings might not be the same if the transfer is between family members other than husband and wife, *see Peck v. United States*, 65-2 U.S. Tax Cas. 97,145 (D. Ga. 1965), the Commissioner seems to have retreated from his attack on transfers of the family home between spouses for he has acquiesced in *Gutchess*, 1967 INT REV. BULL. No. 6, at 6. While the Commissioner probably will not at this time attempt to include homes transfered with the transferor continuing his residence in the transferor's estate, it should not be supposed that he has completely abandoned his attack on all transfers in this area since it does not appear that he has withdrawn his non-acquiescence in *Wier*.

TORTS: Assumption of Risk

Makovicka v. Lukes, 182 Neb. 168, 153 N.W.2d 733 (1967).

Plaintiff Makovicka sought to recover damages from the defendant for personal injuries alleged to have resulted, in October of 1964, from what plaintiff terms as "a practical joke" and from what defendant classifys as "horseplay." When the injuries took place the defendant and his family were visiting at the farm of the plaintiff and her husband. The defendant is a nephew of plaintiff's husband and this was apparently one of many evenings that the families spent together. On this particular evening, prior to the incident which is alleged to have caused the injuries, the parties were in the house joking, laughing and visiting. At approximately eight p.m., about an hour after the defendant and his family arrived at the farm, the defendant suddenly picked up the plaintiff in his arms, carried her through the living room, over the porch and on to the concrete covered banister which was about three feet above the level of the sidewalk. With the plaintiff still in his arms, the defendant lost his balance and jumped to the sidewalk below. Plaintiff testified that at the time of this jolt, she felt an "odd or

snapping sensation in her neck, but no pain." The defendant had not dropped plaintiff neither had he fallen nor had either of them been struck by any object. He then carried her back into the house. The next evening, plaintiff went to the hospital with a swollen neck which was later diagnosed as a branchial cleft cyst. The branchial cleft was congenital; such a condition and its activation into a cyst are unusual. The cyst was removed on December 12, 1964.

The evidence further shows that defendant had picked plaintiff up on several occasions but on the night in question, even by defendant's own testimony, plaintiff was "taken by surprise" and protested such behavior although the defendant insists that the protests were made in a playful manner.

After overruling the defendant's motion for a directed verdict, the lower court submitted the case to a jury which found for the defendant. The plaintiff assigned as error an instruction to the jury on the issue of assumption of risk and the defendant contended that his motion for a directed verdict should have been granted. Reversed and remanded. Held: The defendant's motion for directed verdict was properly overruled and under the circumstances it was improper to submit the issue of assumption of risk to the jury.

The court is here apparently attempting to limit the doctrine of assumption of risk as it disregards the attempts of the defendant to show that the injury allegedly resulted from only one of many similar incidents to which the plaintiff had not really or at least strenuously and effectively objected. But rather the court took the strict position that unless the plaintiff, subjectively, knew, understood and appreciated the risks of the particular conduct, she could not be said to have assumed the risk and that even though the plaintiff may not have protested the course of conduct, the court would not from this assume "an implied consent to be treated negligently."

The court in applying its "subjective standard" refused to be influenced by the past conduct of the parties. "We cannot accept the implication that the passive object of prior practical jokes or horseplay, who did not complain on previous occasions, should be treated as assuming the risk of subsequent practical jokes or horseplay, of which she has no knowledge, simply because she was again the object. Neither can we understand how the plaintiff, having no knowledge of intended horseplay, much less its scope or extent, can be considered an active, voluntary participant who assumes the risk." *Makovicka v. Lukes*, 182 Neb. 168, 171, 153 N.W.2d 733, 735 (1967).

Even though this particular case may have little impact on the widely predicted demise of the defense of assumption of risk,

it is indicative of the gradual erosion which may in time, for all practical purposes, render assumption of risk useless as a defense to negligence actions.

UNIFORM COMMERCIAL CODE: Hospitals are now selling blood.

Jackson v. Muhlenberg Hospital, 96 N.J. Super. 314, 232 A.2d 879 (1967).

Plaintiff brought suit against the hospital, C, a commercial blood bank, and E blood bank, a voluntary, non-profit organization, for injuries resulting from homologous serum hepatitis. The infection was assumed by the court to be the result of "bad blood" furnished by the blood banks to the hospital and then to the plaintiff by transfusion. Plaintiff alleged negligence on the part of all the defendants and also based her claim on implied warranty of fitness for the use intended, or strict liability for furnishing dangerously defective goods. In addition thereto, an issue concerning the possibility of recovery on the theory of express warranty arose in the case.

Two factors in the case were undisputed: (1) at the time blood was furnished by the blood bank to the hospital, and at the time of the decision, no known test for determining whether human blood contains the virus of homologous serum hepatitis existed; (2) every bottle of blood furnished the hospital by the blood bank bore in two places (and in two sizes) a disclaimer to the effect that despite the highest care in the selection of the donors, human blood may still contain the virus of homologous serum hepatitis and consequently the blood bank did not warrant against its presence in the blood.

The first consideration of the court was whether the transfer of blood by a blood bank to the hospital and by the hospital to the plaintiff constituted a sale. The defendants relied on *Perlmutter v. Beth David Hospital,* 308 N.Y. 100, 123 N.E.2d 792 (1954) which denied recovery, though leaving open the question of recovery on the basis of negligence, on the same set of facts. The court in *Perlmutter* struggled mightily with the issue of whether the transfer amounted to a sale or was only part of the service performed by the hospital and thus free from any attempted recovery on the basis of implied warranty. The *Perlmutter* court, prefacing its rationale and holding by stating that while at times a determination as to whether the "essence" of a contract was one of services or sale, it had "no doubt" that a service was involved because the supplying of blood by a hospital was,"... entirely subordinate to its paramount func-

tion of furnishing trained personnel and specialized facilities in an endeavor to restore . . . health." 308 N.Y. 100, 106.

The court in *Jackson* had no doubt either—that such a transfer, for consideration, is a sale—stating that it was unthinkable to hold otherwise. The court cites the definition contained in the Uniform Commercial Code (Neb. Rev. Stat. 2-106 (1), Uniform Commercial Code, 1964) which provides: "A 'sale' consists in the passing of title from the seller to the buyer for a price . . . ." Thus, with a self-assurance equal to the *Perlmutter* court, the court in Jackson categorized the transfer as a sale.

This holding, however, is only the beginning of the ultimate determination of the case, for the court goes on to state, and wisely so, that a classification of a transfer is not determinative of the defendants' liability.

The court states that strict liability in tort for harm caused by defective merchandise sold is the same cause of action as that asserted under warranty; the two are merely different labels for the same legal right and remedy. The basic policy consideration which lead to strict liability must be met before it will be imposed. In the case of blood for transfusion which contains hepatitis the court holds that the blood is neither defective nor *unreasonably* dangerous to the user. The Restatement of Torts 2d, § 402 (A), comment (k), pp. 353-4 is used to support this position. The weighing to be done in order to determine if strict liability is to be imposed involves the means available for avoiding the risk of harm and the extent of the risk balanced against the utility of the product. No means of detecting the homologous serum hepatitis exists, the extent of the risk is small, citing *Fisher v. Welmington General Hospital*, 1 Storey 554, 149 A.2d 749 (Del. Super. Ct. 1959) and the usefulness of blood is common knowledge. In addition, the court states that where the harmful agent may be present without any error or oversight on the part of the producer, the conclusive presumption of fault is inapplicable. The producer cannot know of its presence and therefore cannot control the condition of the blood. Thus, the court disposed of the plaintiff's argument for strict liability.

In regard to the plaintiff's theory of implied warranty, the court was satisfied to rely on the disclaimer of warranty contained on the bottle. Under the Uniform Commercial Code (Neb. Rev. Stat., 2-316, Uniform Commercial Code, 1964) such a disclaimer is valid if reasonable, and since the virus cannot be detected the disclaimer is reasonable.

The disclaimer, the court said, was also an express warranty that the blood bank had used " 'the utmost care in the selection of

donors,'" again citing the Uniform Commercial Code (Neb. Rev. Stat. 2-313 (1) (a) and (2) Uniform Commercial Code, 1964). The court stated that despite the fact that the plaintiff had probably never seen the label on the container she was still entitled to the benefit of the express warranty. In addition to the possibility of recovery on a theory of express warranty, the court also concluded, after discussing the doctrines of res ipsa loquitur and "common knowledge", that the case had to go to trial on the issue of negligence.

Although *Jackson* reaches almost the same result as *Perlmutter*, it does present a more candid approach to the problem of infected blood used in a transfusion. It holds that the transfer of blood is a sale within the Uniform Commercial Code, which would seem correct, but also holds that the hospital or blood bank or both may escape liability through implied warranty of fitness by the use of a disclaimer, which the court holds to be reasonable because of the lack of any method for discovering homologous serum hepatitis in blood. It refuses to invoke strict liability because the policy for holding a party strictly liable is not met, and again the court places a good deal of emphasis on the lack of an adequate discovery technique. This rationale is almost identical to the secondary considerations given to support the result reached in *Perlmutter*, 308 N.Y. 100, 106. The question of negligence is apparently unchanged from *Perlmutter*, and the court in *Jackson* adds the possibility of recovery on a theory of express warranty as provided by the Uniform Commercial Code.

Thus, for all of the court's willingness in *Jackson v. Muhlenberg Hospital* to hold the transfer a sale within the Uniform Commercial Code, it can be but of little consolation for a hospital patient to know that when he obtains blood through a transfusion he has been a party to a sale rather than the recipient of a service and yet be unable to recover damages if he is infected with homologous serum hepatitis.

For all practical purposes, in the absence of negligence, a vendor of blood cannot be held liable for the damages caused by homologous serum hepatitis, which is exactly what *Perlmutter v. Beth David Hospital* decided in 1954.